

1506471 (Migration) [2015] AATA 3643 (16 November 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thi Hoang Yen Nguyen
CASE NUMBER:	1506471
DIBP REFERENCE(S):	CLF2009/22520 CLF2013/197603
MEMBER:	Dr Hannah McGlade
DATE:	16 November 2015
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Spouse) visa: • cl.801.221 of Schedule 2 to the Regulations.

Statement made on 16 November 2015 at 12:24pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 September 2013 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 26 February 2009 on the basis of her relationship with her sponsor. At that time, Class BS contained two subclasses: Subclass 801 (Spouse) and Subclass 814 (Interdependency). The only applicable subclass is 801, as the applicant does not claim to be in an interdependent relationship as required by Subclass 814. The criteria for the grant of a Subclass 801 visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221(2).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 as the delegate did not consider that the evidence established the applicant to be the spouse of the sponsor within the meaning of Section 5F of the Act.
4. The matter is before the tribunal as a result of a Federal Court Order (PEG259 of 2014) setting aside a previous decision of the tribunal finding that it erred in its decision.
5. The applicant appeared before the Tribunal on 5 August 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ty Tran, Huyn Long, Thi Hong Xuan Nguyen, Trong Duy Tuan, Donald Monaghan, Luu Hen and Nguyen Phu Quan. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as required by cl.801.221(2).

WHETHER THE PARTIES ARE IN A 'SPOUSE' RELATIONSHIP

9. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring spouse', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related provisional spouse visa application as the spouse of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring spouse' of the applicant.
10. 'Spouse' is defined in r.1.15A of the Regulations and provides that a person is the spouse of another where the two persons are either in a married or de facto relationship and the

relationship meets certain other requirements. Persons are in a de facto relationship if they are not validly married to each other. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: r.1.15A(1A). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant and sponsor were married on 11 December 2008 in Perth. The Department file contains a copy of the marriage certificate. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by r.1.15A(1A)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

12. The applicant and sponsor have a joint bank account into which they deposit their respective salaries. This account was opened in October of 2008. The applicant also had her own bank account in which she previously deposited her salary. She has also shown the tribunal that cheques being her salary payment have been deposited into the joint bank account.
13. According to the applicant, she and the sponsor have not bought anything together, they plan to buy a car and would like to buy a house but the bank will not lend the money. They spend the cash they have together and if there is money left over they might lend it to their siblings or give it to their nieces and nephews. From their shared monies they pay for the rent and all household expenses.
14. The applicant and sponsor lived in a home they rent from Huyn Long, who also gave evidence. They lived for some years with Don Monahan, who also gave evidence. Huyn Long the owner has since rented the spare room to four overseas students, who provided written letters stating that the applicant and sponsor are living in the house together as a married couple.
15. The applicant and sponsor have no children to care for.
16. They share in the household tasks. The sponsor helps the applicant in cleaning and vacuuming the house. They shop and buy food together. They both cook.
17. The applicant told the tribunal that she and the sponsor like to mix socially with the owner of the house Huyn Long, their siblings and people they work with. They sometimes visit the sponsor's mother. The sponsor said that he doesn't socialise much since his divorce previously, but that he and the applicant do visit his employer and family members.
18. The applicant and sponsor have travelled overseas to Vietnam to visit family and holiday three times since they have been married. They showed photographs of themselves in social settings, with family and friends and holidaying. They also showed photographs of themselves socialising with other people in Perth.

19. According to Huyn Long, he attended the marriage at the registry and his father and the applicant's father are from the same area in Vietnam. He helps them as they share his house. He said they live together happily and they sometimes invite him over for a meal.
20. Donald Monaghan gave evidence that he shared the house previously with the applicant and sponsor for a period of three or four years. He has provided the tribunal with evidence of his address and the tribunal accepts he lived at the address. He said in all that time they were living together as a married couple, they were loving and affectionate and other times he thought they might be having a disagreement although he didn't speak Vietnamese so he wasn't quite sure if it was a disagreement.
21. Luu Hen told the tribunal that she attended the applicant and sponsor's engagement in Vietnam and that she was a friend of the applicant. She said that they returned to Vietnam last year and visited her. They seemed happy together. She also talks to the applicant on the phone and her opinion was that they seemed happy.
22. Other family members who attended the hearing included Nguyen Thi Hong Xuan, the applicant's sister, who gave evidence with her husband Trong Duy Tuan. They both said they visit the applicant and sponsor and see they are living together and happy together. They have not known of any separation or break down of the relationship. The applicant's brother Nguyen Phu Quan gave evidence saying that he was at the applicant and sponsor's engagement ceremony held at his mother's house, the sponsor is a member of his family and he has visited his parents in Vietnam, they seem to be very happy and when they return to Vietnam the family does not see they have any problems. He hopes they stay together happily in Australia.
23. The applicant and sponsor were legally married in December of 2008. They also had an engagement or traditional wedding ceremony in Vietnam prior to the applicant arriving in Australia. They maintain that they have stayed together as a married couple in this time.
24. The applicant gave evidence that she and the sponsor both work and they care for each other at home. She looks after the sponsor who has an illness. The sponsor said that the applicant looks after him and encourages him. She worries about his health and encourages him with medication and exercise. He is pleased with his life with the applicant and sees that they will have a long term relationship until his demise. The applicant also said that they will continue until they are in their old age.

25. *Section 359AA information*

26. The tribunal presented the applicant with information under the Section 359AA procedure during the hearing and subsequently received written responses in regards to the information.
27. According to this information, the department file contains two confidential allegations. In one undated letter, it is stated that the sponsor was hired to pay the applicant for \$35,000 which was to be paid after the marriage of 2009. In another letter of 2010 it was stated that the sponsor and applicant had separated and the applicant was in a relationship with another man and they are 'pretending' to be together. The tribunal noted that a cash payment of \$35,000 was made in the joint account and withdrawn in 2011 and raised this information at the hearing with the applicant.
28. The applicant rejects the allegations that they are in a contrived relationship. They state the cash payment of 2011 was money sent to the applicant by her brother Phu Quan Nguyen to pay a relative who cares for his children who are living in Perth. The tribunal requested some evidence in support of this claim and was able to ascertain that the applicant's brother had a

daughter living in Perth with Truong Duy Tuan who claims in a written statement that he accepted the money from the applicant as he had requested it from her brother. He had personal debts and repaid the debts. He deducted this money from the costs of the living expenses of the children living with him (being the applicant's niece and nephew).

29. The tribunal has also considered a recent report from the department concerning a site visit to the home of the applicant and sponsor on 21 September 2015. The department verified from this report that the applicant and sponsor appear to be living together in the rental property as they claimed. It was confirmed that there were four international students sharing the home. The site visit indicated that the applicant and sponsor shared the bedroom and had photographs of themselves on the walls. Both of their passports were in the bedroom as were their clothes and personal belongings. The sponsor's medications were in the house.
30. The tribunal is not able to place significant weight on the adverse allegations in the department file in view of the evidence of the applicant that the money she received was from her brother who has children living in Perth. The tribunal requested and received a birth certificate indicating that the applicant's brother in Vietnam does have children living in Perth with Truong Duy Tuan as is claimed. The tribunal has also given some weight to the report of the site visit confirming the parties live together in the shared house as they claim.
31. Having considered the evidence, the tribunal is satisfied that the applicant and sponsor are in a genuine spouse relationship. While they have little in the way of joint finances, they have a long standing relationship in excess of 7 years, which is a significant period of time. The tribunal considers that they do not high income earners and would not have been able to make significant financial investments in this period. Also, that the applicant did not have residency status and could not apply for a housing loan.
32. The evidence of various witnesses including Don Monahan, Huyn Long and the applicant's family members who live in Perth, is that they are a happily married couple.
33. The tribunal considers that they do have social life together and with family and work colleagues. They have travelled overseas together on three occasions to visit family and friends in Vietnam. This is confirmed by their photographs of the visits.
34. They both work and give support to each other and care about each other's good health. They see the relationship as being long term until their 'demise' or old age.
35. This evidence considered as a whole leads the tribunal to find that the applicant and sponsor are living together in a spouse relationship. They have a mutual commitment to a shared life to the exclusion of all others. Their relationship is a genuine and continuing relationship.
36. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship. Therefore the applicant meets cl.801.221(2)(c).
37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.
- 38.
- 39.

DECISION

40. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Spouse) visa:
- cl.801.221 of Schedule 2 to the Regulations.

Hannah McGlade
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A Spouse

...

- (3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:
- (ad) a Partner (Migrant) (Class BC) visa; or
 - (ae) a Partner (Provisional) (Class UF) visa; or
 - (af) a Partner (Residence) (Class BS) visa; or
 - (ag) a Partner (Temporary) (Class UK) visa;
- the Minister must have regard to all of the circumstances of the relationship, including, in particular:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).
- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.